



Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

**BILL ANALYSIS**

Telephone: (517) 373-5383
Fax: (517) 373-1986
TDD: (517) 373-0543

House Bill 4240 (Substitute H-2 as passed by the House)
House Bill 4326 (Substitute H-2 as passed by the House)
House Bill 4500 (Substitute H-2 as passed by the House)
House Bill 4573 (Substitute H-2 as passed by the House)

Sponsor: Representative Ken Goike (H.B. 4240)
Representative Jeff Farrington (H.B. 4326)
Representative Eileen Kowall (H.B. 4500)
Representative Gail Haines (H.B. 4573)

House Committee: Regulatory Reform
Senate Committee: Economic Development

Date Completed: 11-2-11

CONTENT

The bills would amend the Administrative Procedures Act (APA) to revise provisions that govern the promulgation of administrative rules.

House Bill 4240 (H-2) would do the following:

- Specify that a guideline, operational memorandum, bulletin, interpretive statement, or form with instructions would be advisory only and not binding on anyone other than the agency and could not be given the force and effect of law.
- Prohibit a rule from exceeding the rule-making delegation in its authorizing statute.
- Require an agency to consider exempting small businesses from a rule under certain circumstances, and expand the methods by which an agency must reduce the economic impact of a rule on small businesses.

House Bill 4326 (H-2) would prohibit an agency from promulgating or adopting a rule more stringent than the applicable Federal standard, unless specifically authorized by Michigan statute, except for an emergency rule.

House Bill 4500 (H-2) would do the following:

- Require an agency's annual regulatory plan to include rules the agency expected to review in the next year.
- Establish standards for a review of rules pursuant to the annual regulatory plan.
- Require each agency to provide a link on its website to the Office of Regulatory Reinvention (ORR) website.

House Bill 4573 (H-2) would do the following:

- Require an agency's request for rule-making to include the decision record of an advisory committee, if applicable.
- Specify that the ORR would not be required to approve a request for rule-making and could do so only after it had indicated that there were appropriate and necessary bases for approving the request.
- Require the ORR to issue a response to a request for rule-making that specifically addressed whether the request had appropriate and necessary bases for approval.

- **Require a regulatory impact statement to include comparison of a proposed rule to standards in other states in the Great Lakes region or other applicable region, and other information.**
- **Require an agency to post a regulatory impact statement on its website at least 10 days before a public hearing on a proposed rule.**
- **Revise a provision pertaining to a challenge to the validity or applicability of a rule.**

The bills are described below in greater detail.

House Bill 4240 (H-2)

Scope of Rules

The bill specifies that a guideline, operational memorandum, bulletin, interpretative statement, or form with instructions would be considered merely advisory, would not be binding on anyone other than the agency, and could not be given the force and effect of law. An agency could not rely upon a guideline, operational memorandum, bulletin, interpretive statement, or form with instructions to support the agency's decision to act or refuse to act if that decision were subject to judicial review.

If a statute authorized an agency to proceed by rule-making or by order and an agency proceeded by order in lieu of rule-making, the order could not be given general applicability to people who were not parties to the proceeding or contested case before the issuance of the order.

A rule could not exceed the rule-making delegation contained in the statute authorizing the rule-making.

("Agency" means a State department, bureau, division, section, board, commission, trustee, authority, or officer created by the State Constitution, statute, or agency action. The term does not include an agency in the legislative or judicial branch of State government, the Governor, an agency having direct governing control over an institution of higher education, the State Civil Service Commission, or an association of insurers created under the Insurance Code or other association or

facility formed under the Insurance Code as a nonprofit organization of insurer members.)

Impact on Small Business

Under the APA, when an agency proposes to adopt a rule that will apply to a small business and the rule will have a disproportionate impact on small businesses because of their size, the agency must reduce the economic impact of the rule on small businesses by doing *one or more* of the following when it is lawful and feasible in meeting the objectives of the act authorizing the promulgation of the rule:

- Establishing differing compliance or reporting requirements or timetables for small businesses.
- Consolidating or simplifying the compliance and reporting requirements for small businesses.
- Establishing performance rather than design standards, when appropriate.
- Exempting small business from any or all of the rule's requirements.

The bill instead would require the agency to consider exempting small business and, if not exempted, to reduce the economic impact of the rule on small businesses by doing *all* of the following when it was lawful and feasible in meeting the objectives of the authorizing statute:

- Identifying and estimating the number of small businesses affected by the proposed rule and its probable effect on small businesses.
- Establishing differing compliance or reporting requirements or timetables for small businesses after projecting the required reporting, record-keeping, and other administrative costs.
- Consolidating, simplifying, or eliminating the compliance and reporting requirements for small businesses and identifying the skills necessary to comply with the reporting requirements.
- Establishing performance standards to replace design or operational standards required in the proposed rule.

Those factors would have to be addressed specifically in the small business impact statement.

The APA allows an agency, if appropriate in reducing the disproportionate economic impact on small business, to use the following classifications of small business:

- 0-9 full-time employees.
- 10-49 full-time employees.
- 50-249 full-time employees.

The bill would require an agency to use those classifications in reducing the disproportionate economic impact of a rule on small business.

House Bill 4326 (H-2)

The APA provides that the violation of a rule is a crime when so provided by statute, but prohibits a rule from making an act or omission to act a crime or prescribing a criminal penalty for the violation of a rule. The bill would prohibit a rule from designating an act or omission as a crime, or prescribing a criminal penalty for a violation, unless provided for by statute.

Under the bill, except for an emergency rule promulgated under the APA, if the Federal government mandated that Michigan promulgate rules, an agency could not promulgate or adopt a rule more stringent than the applicable federally mandated standard unless specifically authorized by Michigan statute.

In addition, except for an emergency rule promulgated under the Act, if the Federal government had not mandated that Michigan promulgate rules, an agency could not promulgate or adopt a rule more stringent than the applicable Federal standard unless specifically authorized by Michigan statute.

House Bill 4500 (H-2)

The APA requires each agency to prepare an annual regulatory plan that reviews the agency's rules.

In completing the annual regulatory plan, the agency must identify the rules it reasonably expects to process in the next year, the mandatory statutory rule authority it has not exercised, and the rules it expects to rescind in the next year. The bill also would require the plan to identify the rules the agency expected to review in the next year.

In completing a review of rules pursuant to the annual regulatory plans, the bill would require first priority to be given to those rules that directly affected the greatest number of businesses, groups, and individuals and those rules that had the greatest actual statewide compliance costs for businesses, groups, and individuals.

A review of rules would have to state the following:

- Whether there was a continued need for the rules.
- A summary of any complaints or comments received from the public concerning the rules.
- The complexity of complying with the rules.
- Whether the rules conflicted with or duplicate similar rules or regulations adopted by the Federal government or local units of government.
- The date of the last evaluation of the rules and the degree, if any, to which technology, economic conditions, or other factors had changed regulatory activity covered by the rules.

The bill also would require each agency to provide a link on its website to the ORR's website.

House Bill 4573 (H-2)

Request for Rule-Making/Decision Record

Under the APA, before initiating any changes or additions to rules, an agency must electronically file a request for rule-making with the ORR. The request must include all of the following:

- The State or Federal statutory or regulatory basis for the rule.
- The problem the rule intends to address.
- An assessment of the significance of the problem.

The bill would require the request for rule-making also to include the decision record, if applicable. "Decision record" would mean, in regard to a request for rule-making where an agency received recommendations or comments by an advisory committee or other advisory entity created by statute, both of the following:

- The minutes of all meetings related to the request for rule-making.
- The votes of members.

If an agency received recommendations or comments by any advisory committee or other advisory entity created by statute regarding a request for rule-making, the advisory committee or entity would have to give the agency a decision record.

The APA prohibits an agency from proceeding with the processing of a rule unless the ORR has approved the request for rule-making. The bill specifies that the ORR would not be required to approve a request for rule-making and could do so only after it had indicated in its response to the request for rule-making submitted by an agency that there were appropriate and necessary policy and legal bases for approving the request.

Under the Act, the ORR must record the receipt of all requests for rule-making on the internet and make electronic or paper copies of approved requests for rule-making available to members of the general public upon request. The bill would delete "upon request". Also, the bill would require the ORR to issue a written or electronic response to the request for rule-making that specifically addressed whether the request had appropriate and necessary policy and legal bases for its approval.

Regulatory Impact Statement

The APA requires the ORR to transmit the agency reports, a copy of the regulatory impact statement, and certificates of approval from the Legislative Service Bureau and the ORR, by notice of transmittal, to the Joint Committee on Administrative Rules. An agency must prepare and include a regulatory impact statement with a notice of transmittal. Under the bill, an agency also would have to prepare and include with a notice of transmittal the request for rule-making and the response from the ORR.

The APA specifies information that a regulatory impact statement must contain. Under the bill, that statement also would have to include both of the following:

- A comparison of the proposed rule to standards in other states in the Great Lakes region, or other applicable region,

and a statement of whether the rule exceeded standards in those states.

- A detailed recitation of the efforts of the agency to comply with the Act's mandate to reduce the disproportionate impact of the rule upon small businesses.

In addition, the APA requires a regulatory impact statement to contain an identification of the sources the agency relied upon in compiling that statement. The bill would require this to include the methodology used in determining the existence and extent of the impact of a proposed rule and a cost-benefit analysis of the proposed rule.

The APA requires an agency to electronically transmit a regulatory impact statement to the ORR at least 28 days before a required public hearing. The bill also would require the agency to publish the regulatory impact statement approved by the ORR on its website at least 10 days before the date of the public hearing.

Challenge to Validity or Applicability of Rule

The APA specifies that, unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule may be determined in an action for declaratory judgment when the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff. Under the bill, determination of the validity or applicability of a rule would include the failure of an agency to assess accurately the impact of the rule on businesses, including small businesses, in its regulatory impact statement.

- MCL 24.232 & 24.240 (H.B. 4240)
- 24.232 (H.B. 4326)
- 24.253 (H.B. 4500)
- 24.203 et al. (H.B. 4573)

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

The bills would generally increase the costs of rule promulgation to all State departments that rely on rule promulgation to fulfill their statutory responsibilities.

House Bill 4240 (H-2) would require State departments that wish to promulgate rules

to make additional considerations for small businesses. These additional considerations could add to the administrative costs of rule promulgation.

House Bill 4573 (H-2) would require additional content in regulatory impact statements issued by State agencies that are proposing new administrative rules. To the extent that agencies are not already analyzing the impacts of new rule proposals on small businesses and comparing the proposals to similar rules already established in other Great Lakes states, the bill would result in some additional administrative costs to these agencies.

The other bills in this package would have no fiscal impact.

Fiscal Analyst: Josh Sefton

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.